



March 8, 2002

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2002-1122

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159574.

The Texas Department of Health (the "department") received a request for "all federal and state deficiencies found against Devereux [Hospital] since 1995." You state that a portion of the responsive information has been or will be released to the requestor. However, you claim that the marked portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 81.046, 81.103, 161.032, 576.005, 611.002, and 611.004(d) of the Health and Safety Code and section 159.002 of the Occupations Code. We have considered the exceptions you claim and reviewed the submitted information.

You concede that the department did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You inform this office that the department received this request for information on October 9, 2001. You requested our decision by letter dated December 28, 2001 and received by this office on January 2, 2002. Thus, the department did not request our decision within 10 business days of the date of its receipt of this request for information, as required by section

552.301(b). Therefore, the information in question is presumed to be public and must be released under section 552.302, unless there is a compelling reason why it should be withheld from disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).*

We begin by addressing your argument that a portion of the submitted documents are protected from disclosure under the Medical Practice Act (the "MPA").¹ Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991).* This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).* We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." *Open Records Decision No. 546 (1990).*

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute.

You state that the department received the submitted medical documents and/or information under section 159.004(1) of the MPA. Section 159.005(e) provides that a person who receives information made confidential by the MPA may disclose the information only to the extent consistent with the authorized purposes for which consent to release the information is obtained. We have marked the submitted information that the MPA makes confidential. The department may release this information only if the MPA permits the department to do so.

We next address your contention that a portion of the submitted information is excepted from disclosure under sections 611.002 and 611.004(d) of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” A “professional” is defined as:

- (A) a person authorized to practice medicine in any state or nation;
- (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or
- (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

Section 611.004(a) provides specific instances in which a professional may disclose information that is confidential under section 611.002. Section 611.004(d) states that “[a] person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information.” You indicate that the department received some mental health records pursuant to section 611.004(a). You further indicate that a portion of the submitted information consists of “copies of mental health records or communications and/or information from mental health records.” We have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code. The department may release this information only if section 611.004(a) permits the department to do so.

Section 576.005 of the Health and Safety Code provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” Health & Safety Code § 576.005. We note that the information submitted by the department that you seek to withhold under section 576.005 is not a “record of a mental health facility.” Therefore, we conclude that this information may not be withheld under section 576.005 of the Health and Safety Code. *See Open Records Decision No. 163 (1977) (construing predecessor statute).*

You assert that additional marked information is confidential under section 161.032 of the Health and Safety Code. Subchapter D of chapter 161 of the Health and Safety Code governs medical and medical peer review committees. Section 161.031 defines a “medical committee” as including “any committee, including a joint committee, of . . . a hospital” and further provides that “[t]he term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” Health & Safety Code § 161.031(a)(1), (b). Section 161.032 provides in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena. . . . Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(c) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital[.]

Id. § 161.032(a), (c). You represent to this office that some portions of the marked documents are records of proceedings held by a medical committee in a health care facility. Based on your representations and our review of the documents in question, we find that none of the information constitutes records, information, or reports of a medical committee under subchapter D of the Health and Safety Code. Thus, the department may not withhold the marked information under section 161.032(a) of the Health and Safety Code.

You also raise section 552.101 in conjunction with the common-law right to privacy and constitutional privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type

protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the items of information that are protected by common-law privacy or constitutional privacy. The department must also withhold this information under section 552.101.

In summary, we have marked the submitted information that the MPA and section 611.002 of the Health and Safety Code make confidential. The department may release this information only as the MPA and section 611.004(a) of the Health and Safety Code permit. Furthermore, we conclude that the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy or constitutional privacy. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 159574

Enc: Submitted documents

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